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No. 88-1066

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of The United States
October Term 1988

ESTATE OF GEORGE JOHNSON, ELEANOR MADSEN, CARMEN COLON, CASIMIRA MACIAS, SOLEDAD FREGOSO, MANUEL COLON, HILDA VALDES, CARMEN REGALADO, AMERICA SUAREZ, FERDINAND KANGISER, MARIA ROMERO, RAFAEL MENDOZA, JOSE LUIZ CORONA, HERIBERTO PIZZARO, RAMON GONZALAS, AND GUILLERMINA OLIVARES,
For Themselves and all Participants in the Reliable Profit Sharing Plan Trust except CHARLES W. LEIGH AND ERVIN F. DUSEK, the Plaintiffs.

Petitioners

v.

CLYDE WILLIAM ENGLE, NATHAN DARDICK, RONALD ZUCKERMAN, LIBCO CORPORATION, TELCO MARKETING SERVICES, INC., TELVEST, INC., THE RELIABLE EMPLOYEES' PROFIT SHARING PLAN TRUST, AND NATIONAL BOULEVARD BANK OF CHICAGO, A National Banking Association.

Respondents

On Petition For A Writ Of
Certiorari To The United States Court Of
Appeals For The Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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February 17, 1989

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I.

Pursuant to Rule 22.6, Petitioners call the attention of this Court to the recent decision by the Ninth Circuit Court of Appeals in *Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406* (1988) in support of their argument in the first

full paragraph at page 14 of the petition, that the lower court's decision is likely to create conflict among the circuits.

II.

Pursuant to Rule 22.5, petitioners make the following reply. CLYDE WILLIAM ENGLE, LIBCO CORPORATION, TELCO MARKETING SERVICES, INC., TELVEST INC., AND THE RELIABLE EMPLOYEES' PROFIT SHARING PLAN TRUST, certain named Respondents, filed no Brief in Opposition. CLYDE WILLIAM ENGLE, and LIBCO CORPORATION, though did cross petition this Court, in Docket No. 88–1232, presenting questions challenging their liability and the lower court's method of determining damages under ERISA. That cross petition does not address the question presented by petitioners and requires no reply.

Respondents, NATHAN DARDICK, RONALD ZUCKERMAN, and NATIONAL BOULEVARD BANK claim to oppose the granting of a Writ of Certiorari to petitioners; but, do so only by restating the QUESTION PRESENTED by petitioners in a manner that lacks "sufficient general importance." See *United States v. Nobles, 422 U.S. 225, 241-242 n. 16 (1975).*

This attempt of certain respondents to oppose the issuance of a Writ of Certiorari to the lower court, by restating the QUESTION PRESENTED bares the serious flaw in its opposition to disgorgement under the common law. The "appropriate disgorgement analysis" urged in support of the lower court's decision confuses the restitutionary remedy under 29 U.S.C. Section 1109 with the common law remedy of disgorgement intended to be a deterrent to breach of the duty of loyalty.

The principal object of the restitutionary remedy expressed in 29 U.S.C. Section 1109 is the apportionment of the wrongdoers' gain and its restitution to the beneficiary along with any losses that may have been incurred. The principal object of the common law remedy of disgorgement also expressed in 29 U.S.C. Section 1109 is preventive. Bogert, *Trusts and Trustees*, Section 543 at page 480 (2d ed. 1960). See also, *Restatement of the Law of Trusts 2d.* Section 206j (1959). There is no punitive remedy expressed

in 29 U.S.C. Section 1109 because the deterrent aspect of disgorgement serves that purpose.

By their misplaced concern that petitioners would obtain all respondents' profits, i.e. a "windfall", these respondents claim that *the disgorgement remedy must be made effective*, as the lower court held, by requiring the Northern District of Illinois to read into 29 U.S.C. Section 1109, a "hybrid" remedy that confuses restitution and disgorgement; and, that hinges upon a "factual causation" which ignores the legislative history of ERISA relied upon by this Court in *Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed 2d 96 (1985) fn 12.*

The facutal analysis and burden of proof relied upon by these respondents in support of the lower court is misdirected given the findings in Leigh I that respondents engaged in prohibited transactions. Had respondents lost both their investment *and the invested trust assets*, restitution of the trust assets would be required. However, where as here, respondents profited by the use of trust assets and gained 9.8 million dollars, returning the trust assets with a 72% return and retaining 9.8 million dollars of profit, is not an "appropriate disgorgement analysis." The finding of prohibited transactions is the misuse and mismanagement of plan assets that ERISA was designed to prevent. Section 1109 does not suggest that a further apportionment of profits or "factual causation" prior to disgorgement is intended. Disgorgement of profits made as a result of a violation of ERISA's fiduciary provisions is the only proper remedy given the misuse and mismanagement of the plan's assets by these respondents.

Respondents also oppose a Writ of Certiorari because the lower court *recognized* traditional trust law principles. The petitioners' reasons in seeking a Writ of Certiorari lay claim to the lower court's failure to apply traditional trust law principles. Traditional trust law principles do not mix the remedies of restitution of losses and disgorgement of profit. The Department of Labor expressing its views in Leigh I, and citing Bogert, *Trusts and Trustees* Section 543 at p. 480 (2d ed. 1960) and *Restatement of the Law of Trusts 2d.* Section 206j (1959), concluded that disgorgement of profits is a proper remedy under these circumstances. In doing so, it stated that disgorgement under the

common law is not a restitutionary remedy--it is intended to be a deterrent to breach of the duty of loyalty. Leigh I, Record, Amicus Brief of Department of Labor, pages 25-28. It is the erroneous engrafting of "factual causation" and "the apportionment of profits" from the remedy of restitution onto the traditional trust law remedy of disgorgement that allows respondents to engage in prohibited transaction and to retain 9.8 million dollars of profit in this case.

Respondents finally oppose a Writ of Certiorari because petitioners' challenge is to the underlying causation guidelines enunciated in Leigh I. A premature review of Leigh I by this Court prior to the Northern District of Illinois decision and the lower court's affirmance relying upon Leigh I, was avoided in order that the question presented might be fully developed for this Court's consideration.

The importance and substantiality of the QUESTION PRESENTED by petitioners is not denied by these respondents. Their only opposition arises from their restating the QUESTION PRESENTED in order to argue that the traditional trust law remedy of disgorgement is not effective until and unless the restitutionary remedy is engrafted thereon. 29 U.S.C. Section 1109 remedy of disgorgement reflects the crucible of congressional concern that fiduciaries would misuse and mismanage trust assets. Disgorgement requires no weakening by diluting it with the restitutionary remedy.

In light of respondents' refusal to face the issues presented in the petition by restating the QUESTION PRESENTED, the need for plenary review of the decision of the lower court is now indisputable. Petitioners suggest that summary reversal may be in order given the recent decision by the Ninth Circuit in *Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (1988).*

Respectfully submitted,

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